

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

April 13, 2006

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RE: Two Farms, Inc. v. Jim Lee, Inc. and Addison L. Tatman
C.A. No. 04C-02-020(THG)

DATE SUBMITTED: February 22, 2006

Dear Counsel:

Initially I note that at oral argument on February 22, 2006, the Court again was informed that the case against Defendant Tatman was settled, but the paperwork was incomplete. I advised I would delay this decision until March 10, 2006, to allow the parties to complete and submit the appropriate paperwork to dismiss the case against Tatman. This deadline has been extended two times now, at the request of counsel, to March 31, 2006; and then to April 13, 2006.

A decision was entered on this case on December 21, 2005, Two Farms, Inc. v. Jim Lee, Inc., Del. Super., C.A. No. 04C-02-020, Graves, J. (December 21, 2005), as to Defendant Lee Lee, Inc.'s Motion for Summary Judgment. Plaintiff sought reargument, which was granted, and oral argument took place on February 22, 2006. This is my decision reaffirming the ruling of December 21, 2005.

In the December 21, 2005, decision, is case I considered the case of Gadow v. Parker, 865 A2d 515 (Del. 2005) ("Gadow") in my determination of whether or not a waiver occurred as to the Maryland forum clause.

Plaintiff sought reargument because defense counsel had not cited the Gadow case and Plaintiff believed the Court should have found that Defendant's slowness in prosecuting the forum issue should result in a waiver by the Defendant of the contractual right to insist on moving the case to a Maryland court.

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Plaintiff acknowledges that Jim Lee, Inc. properly raised the issue in its first responsive pleading. Plaintiff acknowledges that Jim Lee, Inc. pursued the forum issue by filing its dispositive motion on the final date permitted under the scheduling order. Nevertheless, Plaintiff wants the Court to determine, as a matter of judicial discretion, that Jim Lee Inc.'s summary judgment motion was too late because Jim Lee, Inc. had at sometime earlier contractually waived its right to insist on the forum clause. That "sometime earlier" was acknowledged to be a gray area which Plaintiff argues came into existence by Jim Lee, Inc.'s involvement in the case and participation in discovery, but not actively pursuing the enforcement of the forum clause.

As I informed you at the conclusion of oral argument, I cannot find a waiver on the part of Jim Lee, Inc. when I consider the procedural deadline set by an order of this Court.

Any perceived unfairness in the delay also must be shared by the Plaintiff, as it drafted the contract containing the Maryland forum clause but, nevertheless, sued in Delaware. After being on notice that Jim Lee, Inc. was raising the forum issue, neither counsel communicated with the other as to whether they would proceed in Delaware or go to Maryland. Therefore, everyone is frustrated, perhaps with the exception of Defendant Tatman.

For the foregoing reasons the Court republishes its decision of December 21, 2005, and summary judgment is entered in favor of Defendant Jim Lee, Inc. The case is dismissed without prejudice. The case must be refiled in Maryland.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

cc: Prothonotary
Mark Dunkle, Esquire